108

No. 07-1159

FILED

JUL - 3 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

JAMES A. METZ, SR.,

Petitioner,

vs.

CSX TRANSPORTATION, INC.,

Respondent.

On Petition For Writ Of Certiorari To The District Court Of Appeal Of Florida First District

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

C. MARSHALL FRIEDMAN,
Counsel of Record
NEWTON G. MCCOY, *Of Counsel*
C. MARSHALL FRIEDMAN, P.C.
1010 Market Street, Suite 1340
St. Louis, MO 63101
Telephone: (314) 621-8400
Telecopier: (314) 621-8843

Counsel for Petitioner
James A. Metz, Sr.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI 1

Had the Florida Courts Applied the Proper Federal Standard of Accrual of the Cause of Action Under the FELA In This Case, The Issue of When Plaintiff's Cause of Action Accrued Could Not Have Been Determined As a Matter of Law On Summary Judgment 1

CONCLUSION 9

APPENDIX

APPENDIX A – Plaintiff's Exhibit 2 to Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment, Medical Record of Dr. Pace, Examination of Plaintiff, March 1, 2002 (Pl. Ex. 2; Vol.III: 328-329) ..... App. 1

APPENDIX B – Plaintiff's Exhibit 3 to Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment, Medical Record of Dr. Orth, Examination of Plaintiff, March 19, 2002 (Pl. Ex. 3; Vol.III: 330-333 ..... App. 6

APPENDIX C – Plaintiff's Exhibit 5 to Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment, Medical Record of Dr. Pace, Examination of Plaintiff, May 6, 2002 (Pl. Ex. 5; Vol.III: 334-335) ..... App. 12

TABLE OF AUTHORITIES

Page

CASES

Bailey v. Central Vermont Ry., 319 U.S. 350 (1943) 2

CSX Transportation, Inc. v. Adkins, 264 Ga. 203, 442 S.E.2d 737 (1994), cert. denied, 513 U.S. 947 (1994) 8

Fries v. Chicago Northwestern Transportation Co., 909 F.2d 1092 (7th Cir. 1990) 3

Green v. CSX Transportation, Inc., 414 F.3d 758 (7th Cir. 2005) 8

Henderson v. CSX Transportation, Inc., 617 So.2d 770 (Fla. 1st DCA 1993) 2

Hobbie v. Unemployment Appeals Com'n of Florida, 480 U.S. 136 (1987) 7

Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy, 512 U.S. 136 (1994) 7

Monaghan v. Union Pacific Railroad Co., 242 Neb. 720, 496 N.W.2d 895 (1993) 8

Moore v. Morris, 475 So.2d 666 (Fla. 1985) 2

Nichols v. Burlington Northern and Santa Fe Railway Co., 56 P.3d 106 (Colo.App.2002) 8

Ray v. Illinois Central Railroad Co., 864 F.Supp. 569 (E.D.La.1994) 8

Reasons v. Union Pacific R. Co., 886 S.W.2d 104 (Mo.App.1984) 8

TABLE OF AUTHORITIES – Continued

Page

Sabalka v. Burlington Northern and Santa Fe Ry. Co., 54 S.W.2d 505 (Mo.App.2001) 8

Sandoval v. Union Pacific Railroad Co., 396 F.Supp. 1269 (D.New Mex. 2005) 8

United States v. Kubrick, 444 U.S. 111 (1979).....3

Wills v. Sears, Roebuck & Co., 351 So.2d 29 (1977).....2

STATUTES

45 U.S.C. § 56 1

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Had the Florida Courts Applied the Proper Federal Standard of Accrual of the Cause of Action Under the FELA In This Case, The Issue of When Plaintiff's Cause of Action Accrued Could Not Have Been Determined As A Matter of Law On Summary Judgment.

The judgment in favor of CSXT based upon the FELA three-year statute of limitations, 45 U.S.C. § 56, was not entered on a verdict returned by a properly instructed jury after trial. It was a summary judgment. CSXT's Brief in Opposition reviews at length the evidence in the summary judgment record it contends would support a conclusion by the finder of fact at trial in CSXT's favor on the statute of limitations issue. However, CSXT studiously disregards the evidence and the reasonable inferences that would support a conclusion by the finder of fact at trial in favor of petitioner Metz. In its Brief in Opposition, CSXT views both the summary judgment record and the inferences that could be drawn from that record in the light most favorable to CSXT. CSXT thus treats the issues before the Court as if it were defending a jury verdict in its favor rendered by a properly instructed jury. And after trial and jury verdict, it is perfectly appropriate for a reviewing court to view the record in the light most favorable to the verdict.

But resolving conflicts in the evidence or the *inferences* that might be drawn from the evidence is not the role of a trial or appellate court on summary judgment. That is particularly so under the FELA. The right to a trial by jury is "part and parcel of the remedy afforded railroad workers" under the FELA. *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 354 (1943). "To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a good portion of the relief which Congress has afforded them." *Id.* Florida procedural law concerning summary judgment that applies in FELA cases in Florida state courts also emphasizes that record and all inferences from the record must be drawn in favor of the party opposing summary judgment.[1]

In this case both the Florida trial court, by entering summary judgment, and the District Court of Appeal, in its *per curiam* order affirming the summary judgment, determined that the factual issue of

---

[1] *Henderson v. CSX Transportation, Inc.*, 617 So.2d 770, 772-773 (Fla. 1st DCA 1993). A party moving for summary judgment must conclusively show the absence of any issue of material fact. The court must draw "every possible inference" in favor of the party opposing summary judgment and summary judgment should not be granted "unless the facts are so crystallized that nothing remains but questions of law." *Moore v. Morris*, 475 So.2d 666, 668 (Fla. 1985). "If the evidence raises an issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issues, it should be submitted to the jury as a question of fact to be determined by it." *Id. See also Wills v. Sears, Roebuck & Co.*, 351 So.2d 29 (1977).

when Metz's cause of action accrued could be decided in favor of CSXT as a matter of law on summary judgment under these standards. They decided that it could be determined as a matter of law that Metz's cause of action accrued prior to April 5, 2002, more than three years prior to the date this action was filed on April 5, 2005.

The broad issue here is when Metz knew or, in the exercise of reasonable diligence, should have known of the *fact* of his injury. The narrower issue this case involves is how, in turn, that is determined. In this case, the Florida courts have decided as a matter of law that Metz's cause of action accrued prior to April 5, 2002. That determination could not be made as a matter of law unless the Florida courts adopted and applied the erroneous view that a cause of action for cumulative injury under the FELA accrues at the first onset of any symptom, even one of a minor nature. As explained in the Petition, pp. 30-36, such a result represents a misreading and misapplication of the language of *Fries v. Chicago Northwestern Transportation Co.*, 909 F.2d 1092 (7th Cir. 1990), and of the duty of a party to investigate as set forth in *United States v. Kubrick*, 444 U.S. 111 (1979). Had the Florida courts applied the correct test the issue could not have been determined as a matter of law. When a railroad employee experiences symptoms he reasonably believes to be temporary and/or minor in nature, the issue of when he knew or, in the exercise of reasonable diligence, should have known that he had sustained an "injury" turns on when a reasonable

person in the same or similar circumstances would have realized that he was injured, or would have sought medical attention. In this case, that determination could not have been properly made as a matter of law because there were genuine issues of material fact precluding summary judgment under the proper standard.

This is demonstrated most vividly by the records of Plaintiff's medical examinations by Dr. Pace on March 1, 2002, by Dr. Orth on March 19, 2002, and by Dr. Pace on May 6, 2002, matters which are completely ignored by CSXT in its Brief in Opposition. These medical examinations are of crucial importance because the issue here is whether Plaintiff's cause of action accrued prior to April 5, 2002.[2] Dr. Pace had been Plaintiff's long-time primary care physician over a period of 21 years (Depo.I:69, 146; Vol. II: 193, 270). During the examination of March 1, 2002, Dr. Pace's record shows that he actually examined Metz's neck and extremities. (Pl.Ex.2; Vol. III: 328-329). Dr. Pace made a specific notation that there was no tenderness in the neck. He made a specific finding with respect to Metz's extremities that there was normal range of motion and no tenderness. The visit was for a routine physical and although Metz voiced

[2] The records of these examinations were summarized in the Petition at pp. 7-9.

complaints and concerns about other matters,[3] he made no complaints and reported no symptoms regarding his neck, back or extremities. (Pl.Ex.2; Vol. III: 328).

During the examination of March 19, 2002, Dr. Orth conducted a physical examination of Metz, who was a new patient for him, and Dr. Orth's record specifically recites that this examination included "General," "Neurologic," "Neck" and "Extremities" under the heading of "Physical Examination." (Pl.Ex.3; Vol. III: 331). Dr. Orth recorded the results of his examination, which contained no positive findings regarding Metz's neck, back or shoulders. A specific finding was made that Metz's neck was "supple" and without "tenderness." (Vol. III: 331).

This evidence would permit a finding that as of March 19, 2002, only 17 days prior to the critical date of April 5, 2002, Metz had no problems of any kind with his neck, shoulders, or back that could be detected by a physician actually examining those parts of his body. Metz reported no complaints concerning these parts of his body even while diligently seeking medical evaluation for other concerns. This evidence alone would permit a reasonable jury to conclude that Metz's cause of action did not accrue prior to April 5, 2002, and that a reasonable person in Metz's position,

---

[3] Metz did complain about changes in his bowel movements, that he had black tarry stools or blood from the rectum. (Pl.Ex.2; Vol. III: 328).

and in the same or similar circumstances, would *not* have realized that he had sustained a cumulative injury to his neck, shoulders or back, or would have sought medical attention for those parts of his body. It was not until May 6, 2002, almost a month after the critical date of April 5, 2002, that Metz first complained of pain in his right shoulder and that examination by Dr. Pace was first able to identify any positive findings regarding Metz's right shoulder (pain with forward flexion and abduction of right shoulder with tenderness on the top of the right shoulder). (Pl.Ex.5; Vol. III: 334). Even then, there were no examination findings or complaints concerning the left shoulder, neck or back. Copies of the exhibits containing these medical records that were filed with the trial court as part of Metz's opposition to the motion for summary judgment and were part of the summary judgment record are included in Appendix to this Reply Brief at App. 1, App. 6 and App. 12.

CSXT places great emphasis on Metz's deposition testimony and the inferences CSXT draws from that testimony in its own favor. But that testimony must be considered in the light most favorable to Metz, the party defending summary judgment, and in the light of these records. Metz, in his Petition, reviewed the deposition testimony at length at pp. 10-15, and the Court's attention is respectfully invited to that discussion.

It is true that neither the trial court's order nor the *per curiam* order of the District Court of Appeals

affirming the judgment set forth any statement that explained the legal test that was applied to determine as a matter of law that Metz's cause of action accrued prior to April 5, 2002. The point here is that the issue could not have been determined as a matter of law in favor of CSXT had the Florida courts correctly applied the proper federal test for accrual of the cause action under the FELA. The Florida courts could have determined the issue as a matter of law only by applying an erroneous test based on the view that the cause of action under the FELA in this cumulative trauma case accrued as a matter of law at the first onset of symptoms, however minor in nature. This Court has on prior occasions granted certiorari to review unexplained *per curiam* affirmed orders of the Florida District Court of Appeal when, as here, the record below does not support the result reached under the proper legal standard established by the applicable federal law or constitutional law. *See, e.g., Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy*, 512 U.S. 136, 142 (1994); *Hobbie v. Unemployment Appeals Com'n of Florida*, 480 U.S. 136, 139 (1987).

An employee is not deemed "injured" under the FELA, and his cause of action does not accrue, when an employee experiences pain or symptoms which he reasonably presumes or believes to be temporary. When, as here, a railroad employee experiences symptoms he reasonably believes to be temporary and/or minor in nature, the issue of when he knew or, in the exercise of reasonable diligence, should have

known that he had sustained an "injury" (as opposed to pain or symptoms of a temporary nature) turns on when a reasonable person in the same or similar circumstances would have realized that he was injured, or would have sought medical attention. *E.g., Green v. CSX Transportation, Inc.*, 414 F.3d 758, 763 (7th Cir. 2005); *Sandoval v. Union Pacific Railroad Co.*, 396 F.Supp. 1269, 1272-1273 (D.New Mex. 2005); *Ray v. Illinois Central Railroad Co.*, 864 F.Supp. 569 (E.D.La.1994); *Nichols v. Burlington Northern and Santa Fe Railway Co.*, 56 P.3d 106 (Colo.App.2002); *CSX Transportation, Inc. v. Adkins*, 264 Ga. 203, 442 S.E.2d 737 (1994), *cert. denied*, 513 U.S. 947 (1994); *Sabalka v. Burlington Northern and Santa Fe Ry. Co.*, 54 S.W.2d 505, 609 (Mo.App.2001); *Reasons v. Union Pacific R. Co.*, 886 S.W.2d 104 (Mo.App.1984); *Monaghan v. Union Pacific Railroad Co.*, 242 Neb. 720, 729, 496 N.W.2d 895, 901 (1993). This case law is reviewed in the Petition and will therefore not be further discussed here.

A properly instructed jury could reasonably return a verdict in favor of either Metz or in favor of CSXT on the issue of when Metz's cause of action accrued, based on the evidence presented on summary judgment, and the inferences that could be drawn from that evidence. Because different conclusions and inferences could be drawn from the evidence under the proper legal standard, the case was one for the jury and should not have been resolved on summary judgment. Only if an erroneous legal standard were applied by the Florida courts, holding that

the cause of action accrued as a matter of law at the first onset of any symptom, could the issue be resolved in CSXT's favor on summary judgment.

CONCLUSION

For these reasons, and for the reasons set forth in the Petition, Petitioner James A. Metz, Sr., respectfully prays this Honorable Court to issue its writ of certiorari to the District Court of Appeals for the First District of Florida, and to reverse the judgment of the Florida courts and remand this cause for trial.

Respectfully submitted,

C. MARSHALL FRIEDMAN
Counsel of Record
NEWTON G. MCCOY, *Of Counsel*
C. MARSHALL FRIEDMAN, P.C.
1010 Market Street, Suite 1340
St. Louis, MO 63101
Telephone: (314) 621-8400
Telecopier: (314) 621-8843

Counsel for Petitioner
James A. Metz, Sr.

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT IN AND FOR ESCAMBIA COUNTY, FLORIDA

JAMES A. METZ, SR., Plaintiff,	)	
vs.	)	Case No. 05-CA-625
CSX TRANSPORTATION, INC., a Virginia corporation, Defendant.	)	Division F

[The Following Exhibits Were Entered In This Court.]

* * *

PLAINTIFF'S EXHIBIT 2

JAMES METZ 03-01-02

S 53 YO WHO'S ON MAXIMUM DOSE OF GLUCOPHAGE, ACTOS, AND MICRONASE, STATES SINCE STARTING THE AMITRIPTYLINE THE NEUROPATHY IN HIS LEGS AND FEET IS NINETY PERCENT BETTER

ROS HEART AND LUNGS: PATIENT DENIES CHEST PAIN, PALPITATIONS, SHORTNESS OF BREATH WHILE WALKING, AT REST, AT NIGHT, OR WHILE CLIMBING STAIRS DENIES MORNING OR CHRONIC COUGH, COUGHING UP BLOOD OR MUCOUS, WHEEZING IN CHEST, SWOLLEN ANKLES OR FEET, OR NOCTURIA

INTESTINAL: PATIENT DENIES LOSS OF APPETITE, NAUSEA, INDIGESTION, DYSPHAGIA, HEARTBURN, VOMITING, VOMITING BLOOD, PAIN IN ABDOMEN, CHANGE IN BOWEL HABITS, CONSTIPATED MORE THAN TWICE A MONTH, LOOSE STOOLS MORE THAN ONCE A DAY, BLACK-TARRY STOOLS, OR BLOOD FROM RECTUM

O WT. 250 BP 140/86

NECK: NO MASSES, LYMPHADENOPATHY, THYROMEGALY, BRUITS, OR TENDERNESS. CAROTID PULSES ARE FULL AND STRONG.

HEART: REGULAR SINUS RHYTHM WITH NO MURMUR, RUB, OR GALLOP. PMI IS AT THE 5TH INTERCOSTAL SPACE IN THE MID-CLAVICULAR LINE.

LUNGS: CLEAR TO AUSCULTATION AND PERCUSSION

EXTREMITIES: NORMAL RANGE OF MOTION, NO TENDERNESS. NAILS NORMAL

A # 1 DM
2 NEUROPATHY FEET
3 HX. OF ELEV. CHOL.
#4 FATIGUE

P CK STOOLS AT HOME X SIX
BLD DRWN. FOR CMP, LP, CBC, TSH, PSA, AND HbA1C
INC HIS AMITRIPTYLINE TO 50 MG HS
RX # 30 W/5REF
SHOULD BE NOTED HE DID HAVE HIS EYE EXAM WITH DR. COLLIER THREE MONTHS AGO FOR HIS DIABETES EYE EXAM
RE/CK IN FOUR MONTHS

JAMES G. PACE M.D.

JGP/LL

THE STATE OF _____)
) SS
COUNTY OF _____)

AFFIDAVIT

Before me, the undersigned authority, personally appeared, who, being by me duly sworn, deposed as follows:

My name is (affiant) Cathy Garlock, I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am the custodian of the records of James G. Pace, MD.

Attached hereto are pages of records from James Metz, Sr. these ___ pages of records are kept by James G. Pace, MD in the regular course of business, and it was the regular course of business of for an employee or representative of with knowledge of the act, event, condition, opinion, or diagnosis recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time of the act, event, condition, opinion or diagnosis. The records attached hereto are the original or exact duplicates of the original.

Printed Name of Affiant: Cathy Garlock

SIGNED: Cathy Garlock

(AFFIANT)

In witness whereof I have hereunto subscribed my name and affixed my official seal this 26th day of October, 2006.

SIGNED: Jamie S. Goodman

(NOTARY) [SEAL] JAMIE S. GOODMAN
My commission MY COMMISSION EXPIRES
expires: 03/16/10

SEAL:

PLAINTIFF'S EXHIBIT 3

SOUTH BALDWIN REGIONAL MEDICAL CENTER
1613 NORTH MCKENZIE STREET
FOLEY, ALABAMA

REPORT OF OUTPATIENT CONSULTATION

PATIENT NAME: JAMES METZ MR #: 114332

ATTENDING PHYSICIAN:
JAMES G. PACE, M.D. RM #:

CONSULTING PHYSICIAN:

ROGER ORTH, M.D. DATE: 03/19/2002

DATE OF BIRTH

Xxxxxxx x, xxxx

REASON FOR CONSULTATION

The consultation is regarding Hemoccult-positive stools.

HISTORY

This 53-year-old male is being seen at the request of Dr. Pace for Hemoccult-positive stools. He visited Dr. Pace for a routine physical with concerns of his strong family history of cancer on his mother's side, which has been mostly lung cancers. He has no gastrointestinal symptoms at this time, though he had a prior history of severe reflux for several years and took a large quantity of Rolaids. His symptoms suddenly resolved in 1995 after an intense vomiting episode.

He denies any nausea, vomiting, dysphagia, odynophagia, pyrosis, water brash, abdominal pain or bloating, diarrhea, constipation, hematochezia, melena, tenesmus, or history of peptic ulcer or hepatobiliary disease.

PAST MEDICAL HISTORY

His past medical history includes type 2 diabetes diagnosed in 1992, hypertension, and posttraumatic stress syndrome (Vietnam). He is being evaluated for Agent Orange disability.

ALLERGIES

His allergies are none known.

MEDICATIONS

His medications include BC Powder q.d., Glucophage 1 g b.i.d., glyburide 10 mg b.i.d., Actos 45 mg q.d., reserpine 0.25 mg q.d., Pravachol 20 mg q.h.s., Prozac 20 mg q.d., allopurinol 300 mg q.d., Elavil 50 mg q.h.s., and Ambien 10 mg q.h.s.

SOCIAL HISTORY

He has a prior history of heavy alcohol use but quit last August. He denies tobacco use. He is a carman at CSX Railroad. He is married with two children and three grandchildren.

FAMILY HISTORY

His family history is positive for lung cancer in his mother and several of her siblings. It is negative for other cancers, heart disease, or diabetes.

REVIEW OF SYMPTOMS

Cardiovascular: History is positive for hypertension. Endocrine: History is positive for type 2 diabetes, not following his recommended lifestyle modifications. Psychiatric: History is positive for posttraumatic stress syndrome from Vietnam. Constitutional, HEENT, Hematology, Oncology, Respiratory, Rheumatology, Genitourinary, Neurology, and Dermatology: History is negative.

PHYSICAL EXAMINATION

GENERAL: He is an obese, middle-aged white male in no acute distress.

NEUROLOGIC: He is alert, cooperative, and oriented. He walks easily with a normal gait without assistance.

HEENT: Head is normocephalic, atraumatic. Pupils are equal, round, and reactive to light. Sclerae are non-icteric. Conjunctivae are pink with moist mucous membranes.

NECK: The neck is supple without lymphadenopathy, thyromegaly, mass, or tenderness.

CARDIOVASCULAR: There are first and second heart sounds with a regular rate and rhythm without murmur noted.

LUNGS: The lungs have clear, equal bilateral breath sounds, non-labored.

ABDOMEN: The abdomen is soft, round, nontender, and non-distended with bowel sounds present. There is no organomegaly, mass, bruit, or costrovertebral angle tenderness noted.

EXTREMITIES: The extremities are without clubbing, cyanosis, or edema.

IMPRESSION AND PLANS

1. A 53-year-old male with recent Hemoccult-positive stools, as well as age-related risk for colon cancer. We will schedule colonoscopy to rule out neoplasm, polyps, inflammatory process, arteriovenous malformation, or other pathology. If colonoscopy is normal, we will proceed with upper endoscopy to evaluate for bleeding source. We will also obtain recent lab work from Dr. Pace.

2. History of severe gastroesophageal reflux, resolved suddenly and spontaneously several years ago after vomiting episode. This may represent an esophageal tear which has scarred tightly and prefenting reflux. However, I have discussed with patient the need of upper endoscopy to rule out Barrett's esophagus secondary to long-term reflux as well as possible long-term complications such as esophageal cancer. He states he understands these concepts but wishes to hold off on

upper endoscopy unless colonoscopy is completely normal.

3. Type 2 diabetes and hypertension. Followed by his primary care physician.

I, Roger Orth, M.D., have seen and evaluated this patient and agree with the above assessment and plans. I appreciate the opportunity to assist in his care and will keep you informed of our findings.

ROGER ORTH, M.D.
BY JENISA RYALS, PA-C

JR/DWS
D: 03/19/2002
T: 03/20/2002
JOB#: 7816
cc: James G. Pace, M.D.

CERTIFICATION OF MEDICAL RECORDS

I hereby certify that the attached medical records of:

James Metz	**xx/xx/xxxx**
PATIENT NAME	**DATE OF BIRTH**

to my best information and belief is a true copy of the medical record on file at South Baldwin Regional Medical Center, 1613 North McKenzie Street, Foley, AL for date(s) of service:

03/19/2002

That these records were prepared by the medical facility personnel during the course of business at or

near the time of the visit; that I am the duly authorized Custodian of Medical Records and that I have the authority to certify same.

10-26-06 **/s/ Lounette Ingram**
DATE **LOUNETTE INGRAM, RHIT**
DIRECTOR, HEALTH INFORMATION MANAGEMENT

Sworn and subscribed before me on this the 26 day of Oct 2006.

/s/ [Illegible]
NOTARY PUBLIC
My Commission Expires:
6/23/08

PLAINTIFF'S EXHIBIT 5

JAMES METZ 05-06-02

S 53 YO HB OF PAIN IN HIS R SHLDR AND ALSO NEEDS A REFILL ON THREE PRESCRIPTIONS

O BP 136/78

PT HAS PAIN WITH FORWARD FLEXION AND ABDUCTION OF THE R SHLDR WITH SOME TENDERNESS ON THE TOP OF THE R SHLDR

A TENDINITIS R SHLDR

P TRIGGER POINT INJ WITH 30 MG DEPO MEDROL AND ONE CC 1% XYLOCAINE

RX ACTOS 45 MG # 21 ONE P O DAILY W/10REF

RX PRAVACHOL 20 MG # 21 ONE P O HS W/10REF

RX RESERPINE 0.25 MG # 21 ONE P O DAILY W/10REF

ADVISED IF SHLDR NOT IMPROVED IN TWO WKS TO CALL AND WILL SCHED ORTHOPEDIC CONSULT

JAMES G. PACE M.D.

JGP/LL

THE STATE OF _____)
) SS.
COUNTY OF _____)

AFFIDAVIT

Before me, the undersigned authority, personally appeared, who, being by me duly sworn, deposed as follows:

My name is (affiant) Cathy Garlock, I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am the custodian of the records of James G. Pace, MD.

Attached hereto are pages of records from James Metz, Sr. these ___ pages of records are kept by James G. Pace, MD in the regular course of business, and it was the regular course of business of an employee or representative of with knowledge of the act, event, condition, opinion, or diagnosis recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time of the act, event, condition, opinion or diagnosis. The records attached hereto are the original or exact duplicates of the original.

Printed Name of Affiant: Cathy Garlock

SIGNED: Cathy Garlock

(AFFIANT)

In witness whereof I have hereunto subscribed my name and affixed my official seal this 26th day of October, 2006.

SIGNED: Jamie S. Goodman

(NOTARY) [SEAL]

JAMIE S. GOODMAN
MY COMMISSION EXPIRES
03/16/10

My commission expires:

SEAL: